



ABAC Adjudication Panel Determination No 194/21

Product: Maker's Mark
Company: Beam Suntory
Media: TV – Free to Air
Date of decision: 20 August 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 9 August 2021 and concerns television marketing for Maker's Mark (“the Product”) by Beam Suntory (“the Company”), seen by the complainant on Channel 95 (9Gem HD) at 5:15pm on Saturday 7 August, in NSW. The complainant has confirmed that they were watching a live broadcast of the Bledisloe Cup.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;

- State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - Industry codes of practice:
 - AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 9 August 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the advertising.

The Placement

10. The complaint concerns the placement of an advertisement on free-to-air television at 5:15pm on Saturday 7 August, in NSW, during a live broadcast of the Bledisloe Cup.

The Complaint

11. The complainant is concerned about the advertising as follows:
 - *I thought it is illegal to advertise alcohol before 20:30. The advertisement was for Maker's Mark alcohol at 17:15.*
 - *Children are watching at this hour.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.
13. Part 6 of the ABAC Code provides that:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).

- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company's Response

14. The Company responded to the complaint by email on 17 August 2021. Its principal comments were:

- Beam Suntory takes its adherence to the ABAC code seriously and believe we have acted in accordance with the alcohol marketing codes and the ACMA broadcasting guidelines.

Commercial Television Industry Code of Practice (CTICP)

- We can confirm that Maker's Mark has complied with codes regulating the placement of alcohol marketing with the Commercial Television Industry Code of Practice. Within broadcasting guidelines alcohol advertisers can show alcohol ads during sports programs at any time on the weekends starting from 6pm Friday. The placement in question was on Saturday 7 August which is deemed as the weekend and in compliance with alcohol marketing guidelines.
- As a TV broadcaster, you can show alcohol ads on commercial TV and SBS TV:
 - Between 12 pm and 3 pm on school days
 - Between 8:30 pm and 5 am on any day.
 - During sports programs on public holidays and weekends starting from 6 pm Friday.

Source: ACMA (Australian Communications and Media Authority) Guidelines <https://www.acma.gov.au/ads-alcohol-tobacco-or-therapeutic-goods> & CTICP https://www.freetv.com.au/wp-content/uploads/2019/07/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf

Age of audience composition data

- The Bledisloe Cup telecast on Saturday 7 August 2021 comprised of more than 80% of Adults 18+ which is above the 75% guideline as per ABAC responsible alcohol marketing code (Page 4: <http://www.abac.org.au/wp-content/uploads/2019/06/ABAC-Responsible-Alcohol-Marketing-Code-21-June-2019.pdf>)
- With Perth's time zone difference I've shown both transmission times with Bledisloe at 5.15pm AEST which is 3.15pm AWST as well at 5.15pm AWST in case the complaint came from Perth.

Network	Program	Date	Time	Market	Audience (Total People)	Audience (P 18+)	Percentage Audience 18+
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	17:05:00 - 18:59:59	Metro 5 Cap City	304,260	244,266	80%
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	17:05:00 - 18:59:59	Sydney	135,345	123,881	92%
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	17:05:00 - 18:59:59	Melbourne	44,091	41,716	95%
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	17:05:00 - 18:59:59	Brisbane	79,740	69,729	87%
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	16:35:00 - 18:29:59	Adelaide	8,939	8,939	100%
9Gem	Bledisloe Cup 2021	Saturday 7 August 2021	15:05:00 - 16:59:59	Perth	36,145	33,360	92%
9Gem	Bledisloe Cup 2021 Post Match	Saturday 7 August 2021	17:00:00 - 17:29:44	Perth	13,277	12,398	93%

- The above information was obtained from OzTAM. Nielsen Television Audience Measurement Australia (Nielsen TAM) is OzTAM's ratings service provider. OzTAM is the official source of television audience measurement (TAM) covering Australia's five mainland metropolitan markets (Sydney, Melbourne, Brisbane, Adelaide and Perth) and nationally for subscription television. OzTAM owns and holds the copyright for the television audience data it delivers.

Primarily aimed at Adults

- The Commercial Television Industry Code of Practice for alcohol advertisers permits Maker's Mark TVCs to run within sport programs and live sporting events. Bledisloe Cup is classified as a sport programs and as such alcohol brands can be broadcast during sports programs at any time on the weekends.
- The following is an excerpt from the CTICP:

6.2 Alcoholic Drinks

6.2.1 A Commercial for Alcoholic Drinks may be broadcast at any of the following times:

...

b) as an accompaniment to a Sports Program on a Weekend or a Public Holiday; and

c) as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area, if one of subclauses (a) or (b) is satisfied for:

i. the licence area in which the Live Sporting Event being broadcast is held, for an event taking place in Australia;

ii. the majority of metropolitan licence areas in which the Live Sporting Event is shown, for an event taking place overseas.

Source: Page 18 https://www.freetv.com.au/wp-content/uploads/2019/07/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf

- Minor means a person who is under 18 years of age and the Bledisloe Cup is sports program that is not principally directed to minors. Bledisloe Cup is not a children's program as more than 80% of the total viewing audience represents Adults 18+. The Bledisloe Cup broadcast did not appear immediately before or after any C or P classified programs as such Maker's Mark adhered to ACMA guidelines for responsible placement of alcohol ads.

The Panel's View.

15. The complaint raises a concern that the alcohol advertising will be seen by minors (under 18-year old's). This concern enlivens the ABAC Placement Rules which aim to have alcohol marketing directed towards adults and away from minors. With a broadcast medium such as free to air TV it is not possible to exclude under 18-year old's from watching a broadcast, so the rules seek to limit the exposure of advertising to minors through three stipulations on alcohol marketers namely:
 - all applicable media codes applying to alcohol advertising must be complied with i.e. the Commercial Television Industry Code of Practice (CTICP) - Placement Rule 1;
 - the advertisement may only be placed with programs where the audience is reasonably expected to comprise at least 75% adults - Placement Rule 3;
 - the advertisement must not be placed with programs or content primarily aimed at minors - Placement Rule 4.
16. Placement Rule 1 has not been breached. This is because the CTICP, while generally restricting the broadcast of alcohol advertising to after 8:30pm, does expressly permit alcohol advertising in conjunction with the broadcast of a live sport event.
17. Placement Rule 3 establishes the 75% adult audience benchmark for the placement of alcohol marketing. Information on the audience of TV programs is available through the ratings system. The Company supplied audience data which establishes that the Bledisloe Cup attracted a predominantly adult audience more than the 75% threshold. It is evident the placement rule has not been breached.
18. Placement Rule 4 provides that irrespective of the actual audience, alcohol ads cannot be placed with content aimed primarily at minors. While rugby union as a sport and the Bledisloe Cup as an international event contested by long-time rivals Australia and New Zealand has appeal across age groups, including minors, the broadcast of the game cannot be said to be aimed primarily at minors.
19. The complaint is dismissed.